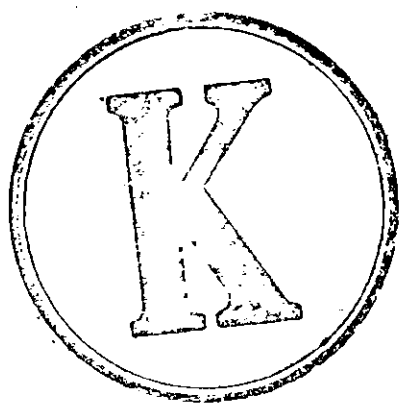
1942

File No. O. Cr. P. C. [redacted] /42

Legal Department
A. Branch



Subject:- Opinions under the Coad of Criminal Procedure 1898

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O. Cr. P. C. /42

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MJR/5/5
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MJR/5/5/
5 Copies

PROSECUTION

Mr. Ranchhobhai Vastabhai, revenue and Police Patel of Barejdi, taluka Daskroi, district Ahmedaba.

Government of Bombay
Revenue Department.
Resolution No 6424/39

Bombay Castle, 9th January 1942

Letter from the Colleter of Ahmedabad No M.A.G. XII-84, dated the 15th September 1941.

Memorandum from the Commissioner, N.D., No. W.T.N.2436 dated the 1st October 1941.

RESOLUTION:-- Whereas in the yaar 1941, Ranchhodbhai Vastabhai held the office of the revenue and police Patel of Barejdi in the Daskroi taluka of the Ahmedabad district and was an officator under the provisions of the Bombay Hereditary Offices Act and as such was a public servant not removable from his office, save by or with the sanction of the Government of Bombay;

And whereas in or about June 1941, the said Ranchhodbhai Vastabhai, while acting or purporting to act in the discharge of his official duty as police patel is alleged to have obtained from one Mana Naran of Barejdi two sums of Rs.7/- and Rs.2/- as a motive for concealing an offence of unauthorized cutting of a Babul tree belonging to the Government of Bombay, by the said Mana Naran;

And whereas it appears to the Governor of Bombay that the said Ranchhodbhai Vastabhai has thereby committed an offence punishable under section 161 of the Indian Penal Code(CLV of 1860);

Now, therefore, in exercise of the powers conferred by sub-section (1) of section 197 of the Code of Criminal Procedure, 1898(v of 1898), the Governor of Bombay is pleased to grant sanction for the prosecution of the said

Ranchhodbhai

Ranchhodbhai Vestabhai for the said offence.

By order of the Governor of Bombay

R.F. Keith,
Under Secretary to Government

B.R., No: 6424/39; R.D.; dated the 9th January 1942

To.

The Commissioner, N.D.,
The Collector of Ahmedabad (with the case Papers),
The Inspector General of Police, Province of Bombay
~~Northern Range~~
The Deputy Inspector General of Police, Northern Range,
The District Superintendent of Police, Ahmedabad
The Home Department,
The Remembrancer of Legal Affairs.

No. of 1942

COPY FORWARDED FOR INFORMATION AND GUIDANCE TO

MJR/4/5

15-12-1941

Submitted

Attention is invited to R.L.A's opinion No. 7228 dated 16-8-1941, in para. 2 of which the R.L.A. had advised that there was sufficient evidence to found a charge against Harising of conspiracy and abetment in respect of the Umri dacoity and that there was no case to extradite him for the Principal offence committed in the Native State In their letter dated 18-8-1941, the P.&.S.D. informed the Resident accordingly and added that this Govt. was considering the feasibility of trying him in British India for the offence of criminal conspiracy and abetment. The P. &.S.D. was of the view that for the prosecution of Harising for the offences of conspiracy and abetment a certificate from the Resident was necessary under Sec. 188, Cr. P.C. The Resident does not agree with that view. The P.&.S.D. now propose to inform the Resident that no certificate is necessary under section 188; and to direct the District Magistrate, Ahmedabad, to take steps for his prosecution for abetment. The following questionz arise for the consideration of the R.L.A.:-

(1) whether a certifiaate under section 188, Cr. P.C. is necessary for the prosecution of Harising in Br. India;

and

(2) whether it is necessary to follow any particular procedure for his prosecu - tion-

2. Section 188, Cr. P.C. would be applicable when a Native Indian subject of His Majesty commits and offence at any place without and beyond the limits of Br. India (Pl. see the opening words of that section). The acts of abetment imputed to Harisingn have all been committed in Bhoyni in Br. India. Under section 4(o) of the Cr. P.C. the expression 'offence' means any act or ommission made pubishable by any law for the time being in force. Under sec. 108A of the I.P.C. the abetment of the commission of any act without any beyond Br. India is also abetment of an offence within the meaning of the Code. Section 109 provides that whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be pubished with the punishment provided for the offence. Abetment of an offence would thus appear to be a distinct offence itself A charge of abetment can also be inquired into or tried by the Court within the local limits of whose jurisdiction the abetment was committed. (III.(a) to sec- 180, Cr. P.C.) sec. 188, Cr. P.C..will have

R.L.A.'s Office

Since the alleged offences of conspiracy and abetment in respect of the Umri dacoity are said to have been committed in British India and not in State territory, the presumption that section 188, Criminal Procedure Code, will have no application is correct. It would be advisable to await the Sabarkantha Agency Court's decision in the main case before considering the question of prosecuting Harising for the offences committed in British India.

Sd/-
P.N. Moos.
19/1

Remembrancer of Legal Affairs.

U.R. to P. &. S.D. No. 552, dated 20-1-1942

MJR/4/5

The accuesed in this case was certified to be sane when put up for trial before the First Class Magistrate, Karwar, on a charge under section 304,I.P.C. On the evidence the Magistrate held that the accused had committed the offence bu that since he was insance at the time of the commission of the offence he could not be held guilty. The Magistrate accordingly discharged the accused under section 209(2) of the Criminal Procedure Code and directed that the accused be handed over to the care and custody of his brother on the latter furnishing adequate security. The question for R.L.A's consideration is whether the Magistrate's order is lega.

2. Section 469 of the Criminal Procedure Code enacts that when the accused appears to be of sound mind at the time of inquiry or trial, and the Magistrate is satisfied from the evidence given before him that there is reason to believe that the accused committed an act which, if he had been of sound mind, would have been an offence, and that he was, at the time when the act was committed. by reason of unsoundness of mind, incapable of knowing the nature of the act or that it was wrong or contrary to law, the Magistrate shall proceed with the case, and, if the accused ought to be committed to the Court of Session or High Court, send him for trial before the Court of Session or High Court, as the case may be. Since tge offence with which the accused was charged was exclusively triable by the Court of Session, the Magistrate should have proceeded with the case and committed the accused to the Session for trial instead of discharging Him. The order of discharge is not

warranted by any provision of the law.

Sd/-
P.N.Moos.
17/2

Remembrancer of Legal Affairs.

U.R. to H.D., No. 1431 dated the 10th February 1942

MJR/4/5

Office of the R.L.A.

A revised draft sanction order is appended.

Sd/-
P.N.Moos
22/7

Remembrancer of Legal Affairs.

U.R. to R.D., No 3504 , dated the 23rd April 1942

MJR/4/5

Pfosecution.

Mr. Ramchandra Timaji Kulkarni
Kulkarni of Rajpur, taluka and
district Sholapur.

Government of Bombay
Revenue Department. R. No 6741/39
Bombay Castle, 8th April 1942

Letter from the Collector of Sholapur, No W.T.N. 278, dated the 5th November 1941.

Memorandum from the Commissioner, C.D., No W.T.N. 3/242 sh dated the 8th December 1941.

Reference to the Remembrancer of Legal Affairs, dated the 7th February 1942.

Memorandum from the Remembrancer of Legal Affairs, No. 2419, dated the 18th March 1942.

The question for consideration of the Remembrancer of Legal Affairs is wherher sanction of Government under section 197 of the Code of Criminal Procedure is necessary for the prosecution of Kulkarni Ramchandra Timaji of Rajur, district Sholapur, under se tion of the Indian Penal Code.

"2 Mr. Ramchandra Timaji Kulkarni is the sole representative watandar in the Kulkarni watan of Rajpur and was working as kulkarni since 27th September 1924. It is alleged that on 21st May 1938, he acepted an illegal gratification of Rs.7-0-0 fpr securing a tagao loan of Rs.250 for certain persons and has thereby made himself liable for prosecution under section 161 of the Indian Penal Code. An officiating Kulkarni cannor be removed from office except with the sanction of the Provincial Government under section 58 of the Bombay Hereditary Offices Act. He is therefore a public the sanction os the Provincial Government as required by section 197, Criminal Procedure Code. The only question therefore that arises is whether he is accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty. It seems that the three holders of Survey No.37 of Rajur viz. Payappa Ramangouda, Dharmaya Hanmant and shivubai Layappa approached the Kulkarni requesting him to secure a tagai loan for them for repairing the well. When the Mamlatdar visited the village, he inspecred the well and sanctioned a tagai loan of Rs.250/- for repairing the well. The Kulkarni had accompanied the borrowers when they attended the Mamlatdar's office for receiving the amount and had signed the tagai bonds as a withness and also attested the thumb inpressionof the borrowers on the bond. After the gagai loan was received it is alleged that the borrowers Rs.7 to the Kulkarni behind the Kacheri for securing the loan for them. Under rule 6 of the Land Improvement Loans Rules, 1916, a Mamlatdar if specially authorized the Collector is competent to grant a loan upto Rs.250/- Under rule 4(1) of the said rules, the application for such a loan is to be presented to a Revenue Officer not below the rank of an Aval Karkun. It therefore appears that the Kulkarni is not in any way officially concerned with the granting of a loan or accepting of an application for the loan. He does not therefore seem to have accepted the bribe in the discharge of his official duty. The next question therefore is whether he can be said to have accepted the illegal grantification while purporting to act in the discharge of his official duty. In his statement before the Mamlatdar at page 1 of File,II, Dharmraya has stated that the three Joint holders (of Survey No 37 of Rajur) viz. Payavle,

viz. Payappa, Shivubai and himself went to the Kulkarni and told him to secure tagai for them and that the Kulkarni said that he would secure Tagai for them but that they will have to pay him something ...

The Kulkarni accompanied them when they went to the Mamlatdar's office for receiving payment. He not only attested the tagai bond as a witness but also attested the thumb impressions of the borrowers. This was presumbly in his private capacity. The borrowers did not hand over the application for tagai to the Kulkarno. On the contracry they handed over the application to the Mamlatdar when he visited their village From all this it appears that he was not acting under the Cloak of his office when he accepted the bribe but his capacity as a public servant put him in a position to commit the offence. The Calcutta High Court holds that in order to make section 197 applicable it is essential that the act constituting the alleged offence should have itslef taken place as an official act or at least under the cloak of what purported to be an official act, i.e., something in the nature of an official character should have attached to the act itself;it is not enough that his capacity of a public servant put him in a position to commit the offence. (page 689 of Mitra's Criminal Procedure Code, 10th edition). The reported decisions on this point are not uniform.

Referring to the conflict of decisions on this point, Mr. Justive Vardachariar of the Federal Court, in Hori Ram Singh V. Emperor, observed as follows:-

"In one group of cases, it is insisted that there must be something in the nature of the act complained of that attaches it to the official character of the person doing it. In another group, more stress has been laid on the circumstance that the official character or status of the accused gave him the oportunity to commit the offence. It seems to me that the first is the correct view. In the third group of cases, strees is laid almost exclusively onthe fact that it was at a time when the accused was engaged in his official duty that the alleged offence was said to have been committed. The use of the expression "While acting" etc., in section 197, the Criminal Procedure Code (Particularly its introduction by way of amendment in 1923) has been held to land some suport to this view. While I do not wish to ignore course of the argument, if a medical officer, while on duty in the hospital, is alleged to have committed rape on one of the patients or to have stolen a jewel from the patient's person, it is difficult to believe that it was the intention of the Legislature that he could not be prosecuted for such offences except with the previous sanction of the Local Government." (page1113-1114 of Chitable and Annajirao's Criminal Procedure Code, Volume I, 2nd edition Federal Court Reports 1939 Volume I, page 159 at pages 187-188) It is a cuestion of fact in each case whether the alleged offence has been committed in an official capacity or not. (see Hori Ram Singh V. Emperor, A.I.R. 1939 F.C. 42.56) In determining this question the Court must at the outset have regard to the allegations in the complaint (if any) in the case (See muhmmad Ismail v Emperior, A.I.R 1929 Lah. 72). In the present case it is doubtful whether the offence can be said to have been committed by the Kulkarni while purporting to act in his official capacity. However that will primarily be question of fact anfit is difficult to anticipate what view the Court may take. It would therefore be advisahle to err on the safe side and accord sanction in this case so that if Court holds that sanction was necessary, the proceedings might not be vitiated."

Resolution.--- Government accepts the opinion of the Remembrancer of Legal Affairs, copies of which should be forwarded.

forwarded to the officers concerned for information and guidance.

2. As regards his circularNo. M.A.G. 432, dated 25th September 1941, the Commissioner, C.D. should be informed that Government does not consider such circular to be necessary

2 Order sanctioning the prosecution of the Kukkarni in the present case are being issued seperately.

By order of the Government of Boamaby

R.F. KEITH?
Under Secretary to Government

R.R., No. 6741/39, R.D., dated the 8th April 1942

To.

The Commissioner, C.D.
The Commissioner, N.D.,
The Commissioner, S.D.
The Collector of Sholapur
The Remembrabcer of Legal Affairs.
The Home Department

No. of 1942

Copy forwarded for information and guidance to --

MJR/4/5.

The question for the consideration of the R.L.A. is whether the order passed by the Presidency Magistrate, 5th Court, Dadar, in Case No.66/P of 1942 acquitting the lunati accused and ordering him to be setained in the Central Mental Hospital at Yeeravada unde section 471, Criminal Procedure Code is correct.

2. The accused was a lunatic and seems to have committed the offence of house-trespass during an unsound state of mind. When the Magistrate examined the accused in Court he found that the accused was insane and was not capabel of making his defence. Under section 464(1) of the Criminal Procedur Code when a Magistrate believes that an accused is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into such unsoundness and get the accused examined by the Police Surgeon. "It after inquiring into the fact of unsoundness of mind of the accused and examining the Surgeon, the accused appears to be insane and unzble to understand questions and to return intelligent replies, the Magistrate should fellow this section and should act on his opinion under section 466 When a Magistrate finds that the accused is quite incapable of making his defence, he ought not to try him and acquit him on the ground of insanity. If the accused be afterwards found to be capable of making his defence, the procedure prescribed in sections 467,468 and 473 should be followed".(Vide Not e 5 at p.883 of Sohoni's Criminal Procedure Cod

1941Edn.) In this case it would be seen from the Magistrate's order that on perusing the evidence of the Police Surgeon and on examining the accused, he found that the accused was insane and not fit to make his defence. The Magistrate should not therefore have proceeded with the trial and directed the acquittal of the accused till the accused appeared to be of sound mind. An order of acquittal involves a trial and a person who is not of sound mind at the time of inquirty or trial cannot be tried. (cf. R.L.A's opinion No. O.Cr. P.C. 5/30, dated 30-5-1930). As stated by H.D. the Magistrate's order is irregular.

Id/19/2

A.S.

Papers may be seen & returned.

The fiew at A in H.D. Office note at p 5 ante is correct

Sd/- 20/2/

Mjr/4/5

Submitted

Attention is invited to R.L.AIs. opinion No. 8460, dated 26-9-41 in which the R.L.A. had advised that the rules sanctioned in G.R. P.D.No. 7107. dated 24-9-12 had no application to execution of commissions under sec. 503(2) of the Gr. Pro. Code. The Resident for Baroda and Gujrat States was informed accordingly and as regards execution of commissions under sec. 503(2) his attention was invited to the decision in Sikandar v the Crown, ~~xxx~~ I.L.R. 9Lah 347. The Resident doubts the above view of the Bombay Govt. and considers that commissions under sec. 503(2) can only be executed by Political officers with the consent and co-operatiion of the State in which the witness to be examined resides. The Resident has taken the matter to the Govt. of India which has called for the remarks of this Govt. The R.L.A. is requested to advise on the points raised in paras. 2 and 4 of the P.&.S.D. office note.

2. The first point is about the service of summonses. The R.L.A. was of the view that the strength of rule 5 of the rules s sanctioned in G.R.P.D. No.7107, dated 25.9.12 was not valid as these rules merely defined the scope of direct correspondence between the Police officers of the State and the Kathiawar Agency Police. The H.D. considers that that artangement has no reference to the service

objection raised by the Baria Darbar on the strength

of summonses issued by British courts; and even if it is presumed that the orders in G.R.No.7107, dated 24-9-12 provide for the service of summonses, that arrangement is superseded by the orders issued in G.R. P.D. No. 8152, dated 3-1-33, By that G.R. Govt. has sanctioned reciprocal arrangement for the direct service of summonses and notices between British Indian courts in this Province and the courts of the States mentioned in the Resolution. The Baria State has also been mentioned. This is also the arrangement referred to in High Court Criminal Circular No. 21(iv) at p. 18 of the Circulars. (Pl. seealso Asstt. Secy's note dated 1-8-42 at p. 189 of the File O.Cr. P.C./41). As the Circular is quite clear on the point the view taken by P.&.S.D. that there is no need for further reciprocal arrangement is correct.

3. The next question is about the execution of commissions under sec.(503)(2) of the Cr.Pro.Code. In this respect the view expressed by the Resident that such commissions can be executed only with the consent and co-operation of the State appears to be correct. The H.D. proposed to grant reciprocity to States in this respect. Whether reciprocal arrangement should be made would be for H.D to decide.

Id/27/2

The first question for the consideration

Office of the R.L.A.

Seen and returned.

2. No point of law or interpretation of any legal provision appearsto be involved in this case. As to the context in the light of which Rule 6 ought to be construed, the Remembrancer of Legal Affairs has already expressed his view s in his Un-official Reference to the Home Department No.8460, dated 26th September 1941(referred to in paragraph 3 at page 22ante) If, however, that rule is to be construed as an independent arrangement, it cannot be said to have been modified by the general arrangment for service of summonses agreed to in 1933 (i.e. by government Resolution, Political Department No8052, dated 3rd January 1933). The General question of mere service of summonses and notices will be quite distinct from any specific arrangement not be call certain officers in certain circumstances as contemplated by Rule 5.

Sd/-
P.N.Moos,
24/3
Remembrancer of Legal Affairs.

U.R.to and S.D., No. 2714 dated the 26th March 1942.

Mjr/2/5

Office of the R.L.A.

The Inspector General of Police, Bombay, observes that under section 67 of the Code of Criminal Procedure, 1898, the Police have powers of arrest in non-conizable cases in certain circumstances. But when an arrest is not effected it is assumed that the Police have no authority to demand bail to secure the appearance of the accused in court. He further observes that the interpretation placed by one of his Police officers on the distinction between the use of the wores,"arrested or detained in section 496 of the Code is that a person accused of committing a non-conizable offence, although not arrested under section 57, may be detained for the purpose of recording particulars and released on firnishing baill. The R.L.A. is accordingly requested to advise whether the Police Officer's interpretation is legally correct.

2. In the case of non-conizable offences, the power of the Police to arrest without warrant arises only under the conditions specified in section 57 of the Criminal Procedure Coxe i.e. when the offender refuses to give his name and address or gives a name and address which the Police Officer has reason to believe is false. Section 496, inter alia, provides that wheh any person other than a person accused of a non-bailable offence is arrested,or detained without warrant by an Officer-in-charge of a police station and is prepared to give bail, such person shall

be released on bail.

3. The precise signaficance of the disjunctive 'or' in section 496 is not clear. But it certainly does not cannote power of the Police Officer to detain an accused person before arrest. Detention by police means detention in police custody, in a police lock-up or otherwise. urveillance is one thing and detention in any kind of custody another. It is a mere evasion of the law to place a suspected person in what is ordinarily known as 'Nazar Kaid' and to say that he is not under arrest. When a person is placed under 'Nazar Kaid' or police supervision or restraint, he must be deemed to be in police custody. The power tomarrest implies power to detain. But it is illegal to keep a man in a condition of restraint without arresting him. In 1885 A.W.N. 59, the Full Bench disapproved the practice whereby persons who have not been formally arrested, are in a condition of restraint, which in fact amounts to theri being in custody of the police. It was held in that case that it was a gross and unwarrantable breach of the powers entrusted to Police Officers and that it was intolerable that the police should pursue the investigation of crime by defying all the provisions of law for the protection of the liberty of the subject inder the colourable pretention that no actual arrest has been made when to all intents and purposes a person has been in their custody

In cases where a suspected person is not arrested forthwith and the Police Officer , for sufficient reason, postpones immediate arres

care must be taken that the suspected person remains at liberty and is a free agent. If the circumstances of the case require, it is the duty of the Police Officer to watch the suspect's movements, openly or secretely, and to keep himself acquainted with the suspect's actions so as to be able to arrest him at any given moment, but no restraint of any kind can be lawfully exercised over the supect so long as he is not placed under formal arrest. Consequently, the view taken by the Police officer is not correct.

Sd/- P.N.Moos.
9/5
Remembrancer of Legal Affairs.

U.R. to H.D., No 3910, dated 11-5-1942

Mjr/4/5

Office of the R.L.A.

It appears that the godown of the South India Corporation Madras) Ltd. was searched by the Police under section 66 read with sections 103 and 194 of the Bombay City Police Act, 1902 in connection with the offence under rule 81(4) of the Defence of India Rules for breach of and order con-tained in government Notification Nos.13 and 13-H, dated the 25th June 1942 requiring every person to f file a full and correct statement in the prescribed form o of the stocks of rice or paddy held by him own account of or in partner-ship with any other person in connection with his business. The godwonwas found to contain 3752 bags of rice and has been taken possession of with its contents by the Police presumably under section 105 of the Bombay City Police Act. The question raised for the consideration of the Remembrancer of Legal Affairs is whether the stock can be removed to any of the Government godowns and if so what legal formalities, if any, are necessary.

2. Section 516A of the Criminal Procedure Code provides when any property regarding which any offence appears to have been committed or which appears to have been used for the commission of any offence is produced before any Criminal Court during an inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusionof the inquiry or trial and if the property is subject to speedy or natural decay, may, after recording such evidence, order it to be sold or otherwise disposed of. In the circumstances the only course legally feasible would be to apply to the Magistrate who was has jurisdiction, to pass an order under section 516a for the removal of the stock to a Government godown pending the conclusion of the trial On the application being granted, there would be no legal

legal objection to r emoving the stock to a Government godown for safe custody.

Sd/-
P.N.Moos
28/8

Remembrancer of Legal Affairs.

U.R. to the G.D., No 6854 dated the 21st August 1942

Mjr/4/5

Submitted.

2. Please see the judgment of the Sessions Judge, Nadiad in Misc. Application No. 30 of 1941 and H.D. notes at pp- 23-27 ante. H.D. considers that the remarks made by the Sessions Judge, Nadiad, in para 6 of his judgement were not quite justifies. The D.S. H.D. is of the view that in view of the remarks made by the C.J. in Rogers P.U. vs. shrinivas Gopal (XLII Bom. L.R. 478) this is a fit case for moving the High Court for making a provision in the Criminal Circulars asking Judges and Magistrates to be temperate in their criticism to resist the temptation to generalise, to limit themselves to the case in hand and be careful in dongnatising on matters not actually at issue in the case of which they may bot knos all sides; and that Govt. propose to a sk them D.M. to inform the Hon. Magistrate in this particular case that in the opinion of Govt. the remark passed by the Sessions Judge is unjustitied. The R.L.A. is requiested to advise whether rhe D.S., H.D.'s proposal is feasible.

Please see in this connection A.L.A's opinion No. 3868, dated 30-4-41. The ecy. H.D., says in his note at p 28 ante that para 4 of the S.J. 's judgment was sufficient to meet the needs of the case and that there is no doubt that the Hon. Magistrate was some what perfunctory. It appears therefore that the only remarks to which H.D. takes objection is that marked in red pencil in para 6 of the judgment. this sweeping

generalisation made by the Sessions Judge is no doubt in excess of the needs of the case by any revisional application to be filled in the High Court for expunging that remark is already time brred under Rule 69(2) of the Appellate Side Rule, 1936. The High Court is also reluctant to interfere and expuange such remarks from a judgment unless it has been brought before it in a regular appeal or application (P.J. Rogers vs. Shrinivas Gopal, XLIII Bom. L.R.P. 478). To avoid recurrence of such cases H.D. proposes to move the High Court for making a provision in the Criminal Circulars on lines of para 1(d) of Chapter I of the High Court Criminal Circulars. The proposal made by hH.D. appears to be free from objection. But it does not appear necessary to state in the letter that ,Government proposes to ask the D.M. to inform the Hon. Magistrate that in the opinion of the Govt. the remark in question was unjustified as it is difficult to anticipate what view the High Court will adopt in this patticular case.

Sd/- P.S. Nadkarni

6/8/

Mjr/4/5

H.D. proposes to move the High Court to issue a circular asking Magistrates and Sessions Judges to be temperate in their language, particularly in their criticism of trying Magistates, and generally to confine themselves to the case in hand and the matters in issue. There appears no objection to making the proposal. The present case may be cited as an instance of intemperate language. But it would hardly be in keeping with legal propriety officially to inform a subordinate Honourary M Magistrate that is the opinion of Government the Sessions Judge's remarks were unjustified.

Sd/-
P.N.Moos.
Remembrancer of Legal Affairs.

U.R. to H.D., No. 6984, dated the 27th August 1942

Mjr/4/5

Submitted-

The question for the consideration of the R.L.A. is whether Mr. H.A.G. Acton. I.C.S., who is at present holding the post of Extra Personal Assistant to the Collr. of Poona can exercise the powers of a I class Mag. comferred upon him when he was appointed a sub-Divisional Magistrate-

2. By G.N.H.D.No. S50/2/739, dated 9-12-1938 Mr. Acton was appointed under sec. 12 of the Cr. Pro. Code to be a Magistrate of the First Class in the ~~Ab~~ Satara Dist. Subsequently he was transferred as Sub-Divl. Magistrate in the Poona. Dist-Sec. 40 of the Cr. Pro. Code 1898, provides that whenever any person holding an office in the Govy. who has been invested with any powers under the Code throughout any local area is appointed to an equal or higher office of the same naturel within a like local area under the dame Provl. Govt. he shall, unless the Provl Govt. otherwise directed, exercise the same powers in the local area in which he is so appointed. Under this section therefore Mr. Acton carried the powers of a F.C. Mag. with him when he was appointed as Sun Divl. Magistrate in the Poona Dist. The present post he holds is that of the Extra Personal Astt.. to the Collr. and not that of a Magistate. The Criminal Procedure Code recognises the following Magistrates: The D.M., the Addl. D.M.. Magistrate of the I,II and III Class, the Sub-Divl. Magistrate and Special Magistrate. While holding the post of P.A. Mr. Acton cannot he said to have been appointed to an

to an office of the "same nature" as that of a Magistrate. (Vide the cases quoted in mpte 93 at p. 100 of Mitra's Cr. Code, 10th end) He cannot therefore exercise the powers of a I Cl. Magistrate. The view taken by the U.S., H.D. in his note dated 29-8-1942 appears to be correct. It is intended that Mr. Acton should exercise the powers of a I calss Magistrate Govt. will have to invest him with these powers afresh

Sd-
D.W.D.
4/9/

Mjr/4/5

Office of the R.L.A.

The matter is doubtful and it seems safer to invest Mr. Action with irst Class powers by means of another notification

Sd/-
P.N.Moos.
18/9

remembrancer of Legal Affairs.

U.R. to H No. 7562 dated 19-9-1942

Mjr/4/5

Office of the R.L.A.

The question for the consideration of the R.L.A. is whether one of the conditions imposiable under section 401 of the Code of Criminal Procedure could be the giving of security.

2. Sub-section (1) of section 401 of the Code of Criminal Procedure provides that when any person has been sentenced to punishment for an offence, the Provincial Government maym at any time, without conditions or upon any conditions which the person sectenced acepts, suspend the execution of his sentence or remit the whole or any part of the punishment which he has been sentenced. Sub-section (3) enacts that if any condition on which a sentence haa been suspended or remitted is, in the opinion Government may cancel the suspension or remission, and thereupon the person in whose favour the sentaane has been suspended or remitted may, if at large, be areested by any police officer without warrant and remaided to undergo the unexpieed portion of the sentence. Reading these provisions together it wouod appear that a condition upon which a sentence can be suspended or remitted under sub-section(1) should be such that a breach of it would empower Government to cancel the suspension or remission involving the rearrest of the person for undergoing the unexpired portion of the sentence, and not such as to result in any financial liabilty xxxxxfx Consequently a stipulation that the person would forfeit a sum of money to Government if after suspension or remission of his sentence he commits an offence wouod not it seems to come within the scope of sub-section(1) of section 401 of the Code of Criminal Procedure.

Sd/- P.N.Moos
23/10
Remembrancer of Legal Affairs.

U.R. to H.D. (Spl) No. 8635 dated the 24th October 1942.

MJR/5/5/

Below endorsement No.M.A.G- 201 dated 7-10-1942

From the District Magistrate, Ahmedabad.

No. M.A.G.-270
Shahi Bagh, Ahmedabad, No.4

14th October 1942

Forwarded with compliments to the Remembrancer of Legal Affairs, Bombay.

2. Rule 3A of the Rules framed under sec. 386C.P.C. does not make it clear whether the undivided share of a member of a Joint Hindu Family can be attached by way of sizure. Such a difficulty was anticipated by Government in the apportionment and recovery of collective fines imposed under Ordinance XX of 1942 and they have now inserted clause 3 A and amended clause 4 of section 3 of the Ordinance.

Sd/-

Commissioner, N.D.

MJR/5/5

District Government Pleader's Offic
Ahmedabaddm Dated 5gh Oct. 1942

No. 2296 of 1942

From

D.B. Ratilal J Lakhia, LL.B.,
Dist. Govy Pleader & Public Prlsecutor, Ahmedabad.

To

The Remembrancer of Legal Affairs, Bombay
B O M B A Y

Subject:- Third party claims to the property attached for recovery of fines under section 386 of Cri. Pro. Code.

Sir,

I am directed by the District Magistrate, Ahmedabad, by his No. M.A.G. 201 dated 28-9-1942 below D.S.P.'s letter No 826 dated 25-9-42 to appear in inquiries with regard to third party claims to property attached for recovery of fines in the court of the City F.C. Maggistrate, Ahmedabad, on behalf of the Crown. A copy of the said letter is forwarded herewith.

In the city of Ahmedabad there are several cases arising out of the present political situation in which the accused have been convicted and sentenced to pay a fine and forc[illegible] realising the fine imposed distress warrants were issued by the City Magistrat Ahmedabad, and in some cases the share of the offender in the moveable property of joint Hindu Families has been attached by the Police by war of seizure. And third parties have now filed claims to such properties that have been attached.

Government have framed Rules in 1932 under section 386 (2) of the Criminal Pro. Code and there are subsequent amendments to these rules. From these Rules it appears doubtful to me as to whether the undivided shares of the offender in Joint Hindu Family could be attached by way of seizure under section 386 of the Cr. P. Code, to realise the fine imposed oj member of a Joint-Hindu Family:-

According to Hindu Law the underfined share of a co-partner in a movable property belonging to a Joint Hindu Family cannot be attached and sold. Under Rule 47 of Order 21 of the Civil Pro. Code also, only the share of a co-owner can be attach-

ed. Ruling in 27 Bom .L.R. Page 1363 seems to be to me only an Obiterdictum but the Full Bench Ruling in 39 Madras at Page 832 shows that the undefined share of a member of a Joint Hindu-Family can be attached. The question in the present case, however, is ehrther any such share could be attached by seizure and the Ruling in 39 Madras Page 831 quoted above only speaks of an attachment by the appointment of a Receiver-

Thus in my opinion there is considerable difficulty in supporting the action of the police when they have made attachment by seizure of the property of the joint Hindu Family. I have, therefore, the honour to r equest that you will be so good as to give me such necessary instructions in case you think that the action of the Police can be supported in the Court.

Your mostobedient servant.

Sd/-
Ratilal J. Lakhia

Dist Govt. Pleader and
Public Prosecutor, A' bad.

5/10/1942

Forwarded through the District Magistrate, Ahmedabad with a request that he may refer the matter to the Remembrancer of Legal Affairs, Bombay, if he thinks proper

Sd/-
Ratilal J Lakhia

P.P. Ahd-

No. M.A.G. -201
Ahmedabad, 7th October 1942

Forwarded with compliments to the Remembrancer of Legal Affairs, Bombay

Submitted through the
Commissioner, Northern
Division,

Sd/-
District Magistrate,
Ahmedabad.

MJR/5/5/

No. 9194 Office of the
Remembrancer of Legal Affairs.
Bombay Castle, 16th November 1942n

From

P.N.Moos, Esquire Bar-at-Law I.C.S.,
Remembrancer of Legal Affairs.

To.

The District Magistrate,
Ahmedabad.

Subject :- Third Party claims to the properity attached for recovery of fines under section 368 of the Code of Criminal Procedure.

Sir,

With reference to your endorsement No. M.A.G. 201 dated the 7th October 1942 on the above subject.I have the honour to observe as follows:-

The question is wherher the undivided share of an offender in the joint Hindu family moveable property can be attached by seizure clause(a) of section386(1) of the Criminal Procedure Code.

The question has been considered by the Remembrancer of Legal Affairs on serveral occasions and on his advice after reviewing the decisions of the various High Courts, rule 3 A was inserted in the Rules framed by Government under section 386(2), Criminal Procedure Code. That rule provides that where the property to be attached considets of the share or interest of the offender in moveable property belonging to him and another as co-owners the attachment shall be made after an order to that effect from the court issuing the warrant by a notice to the offender prohibiting him from transferring the share or interest or charging it in any way. Although there is conflict of opinion between different High Courts on the legality of the attachment of the share or interest of an offender in the joint Hindu family moveable property under section 386(1), Criminal Procedure Code (see 27 B.L.R 1363;60 Cal. 92;55 Mad. 1041 and A.I.R. 1939 All 373), it is at any rate evident that no such property can be lawfully attached by seizure under section 386(1) and the only course open would be to follow the procedure laid down in rule 3A and attach the

attach the share or interest of the offender by a notice to him prohibiting him from transferring or charging it in any way.

Your obedient servant,

Sd/-
P.S.H

For Remembrancer of Legal Affairs.

No. 9195

Office of the

Remembrancer of Legal Affairs,

Bombay Castle, 16th November 1942

Copy forwarded with compliments to the Commissioner to the Disrtict Government Pleader,

Norther Division, reference to his endorsement No.
letter No

M.A.G.-270 dated the 14th October 1942
No. 2296 dated the 5th October 1942

Sd/-
P.S.H.
fo Remembrancer of Legal Affairs.

MJR/5/5/